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In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 220

FREDA R. CASPERSEN, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Board of Tax Appeals (R. 1–5) is reported in 40 B. T. A. 758. The opinion and dissenting opinion in the Circuit Court of Appeals (R. 7–13) are reported in 119 F. (2d) 94.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered April 1, 1941 (R. 13). The petition

for a writ of certiorari was filed June 28, 1941. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

The taxpayer transferred property to her husband in trust to pay a specified amount of income annually to herself, the remaining income to be distributed, in the husband's discretion, to the taxpayer, or to relatives of either of them, and any income still remaining to be accumulated for the benefit of their son. Is the taxpayer accountable for the income in excess of that actually paid to her? The answer depends upon whether her husband had a "substantial adverse interest" in the disposition of such remaining income within the meaning of Section 167 of the Revenue Act of 1934.

STATUTE AND REGULATIONS INVOLVED

The statute and regulations are set forth in the Appendix, *infra,* pp. 9–12.

STATEMENT

The Board of Tax Appeals found the following facts (R. 1–3):

Taxpayer, a resident of New Jersey, on June 3, 1932, transferred to her husband, Olaus W. Caspersen, as trustee, certain shares of stock having a value of about $55,000 in trust, the trust agreement providing in part (R. 1–2) that—

(3) From the net quarterly income arising from the trust fund hereby created, to pay Firstly, to the said Freda R. Caspersen for and during such time as the said Olaus W. Caspersen, her said husband, shall live, the sum of Six hundred ($600.00) dollars every three months, provided, however, that she shall during such time remain the wife of the said Olaus W. Caspersen, and Secondly, to pay out of the remaining balance, after the aforesaid payment, to any blood relative or relatives of the said Freda R. Caspersen and Olaus W. Caspersen at such time, in such amounts, and to such person as in the sole judgment of said Trustee, Olaus W. Caspersen, he shall choose and deem best or proper, to aid them in meeting their necessary living expenses, and Thirdly, any unexpended income remaining after the aforesaid payments in the discretion of and during trusteeship of Olaus W. Caspersen may be paid in whole or in part to the said Freda R. Caspersen or if not paid at the close of the calendar year, shall Fourthly, be added to the corpus of the trust and shall be reflected in a special account on the books of the trust. Such amount as may be accumulated as evidenced by this account may be distributed in the discretion of Olaus W. Caspersen, during his trusteeship only, for the payment of educational, food, shelter, clothes, medical or other necessary expenses of any child or children of Olaus W. Caspersen and Freda R. Caspersen or any issue of such child.

Numerous contingencies and final distribution of the trust fund were provided for in the trust instrument. The trust was not to end until both the taxpayer and her husband had died and their son had attained the age of 40 years, or sooner died, but the husband had power to terminate the trust during his life, in which case the trust fund was to be distributed to the children of taxpayer and her husband or to the issue of such children. The trust has not been terminated. Some of the shares of stock transferred in trust taxpayer had purchased and the rest she had received as a gift from her husband (R. 2).

The taxpayer and her husband live together. They have one son now living, who was born in January 1929. He had a few thousand dollars' worth of property in his own name in 1935. Taxpayer's husband created a trust of which the son is a beneficiary. Taxpayer also set up another trust for the son. The son is the beneficiary of a life insurance policy. Taxpayer's husband opened a bank account for the son; she and her husband made gifts to him of $25 each month, and these were deposited in the account (R. 2).

The income of the 1932 trust was $9,522.30 in 1934 and $10,482.12 in 1935. Of this, $5,200 was distributed to taxpayer in 1934 and $3,400 in 1935; approximately $3,400 was added to the corpus in 1934 and $4,756.95 in 1935, and the balance in each year was distributed to blood relatives of taxpayer

and her husband. Those relatives in 1934 included taxpayer's mother, and her husband's niece, two aunts, two aunts of his father and an aunt of his mother; and in 1935, also the mother of taxpayer's husband and his cousin. Most of them were old and not wealthy. None of the accumulated income has been paid to or on behalf of the son. The trust has not loaned or borrowed money. (R. 2–3.)

In the years 1932–1935 taxpayer's husband had gross and net income as follows (R. 3):

	Gross income	Net income
1932	$43,742.58	$41,407.00
1933	41,225.32	37,301.61
1934	43,137.81	40,782.06
1935	54,432.76	51,786.00

In 1932 he had approximately $100,000 in assets. In 1934 he paid for a governess who took care of the son. He owns a house in Montclair, New Jersey, for which he paid approximately $14,000 or $15,000, and he maintains it as a home. He pays all the bills in connection with its upkeep and maintenance and supports his wife and son according to their station in life (R. 3).

The taxpayer included within her taxable income for 1934 and 1935 only the amounts of the trust income which were actually distributed to her but the Commissioner ruled that she was also taxable upon the balance of the trust income (R. 3).

Upon review, the Board of Tax Appeals held such action of the Commissioner was erroneous but the court below reversed the decision of the Board.

ARGUMENT

Section 167 (2) of the Revenue Act of 1934 (Appendix, *infra*) provides that where any part of the income of a trust may, in the discretion of the grantor or of any person not having a substantial adverse interest in the disposition of such part of the income, be distributed to the grantor, then such part of the income of the trust shall be included in computing the net income of the grantor.

The court below held, correctly, we submit, that the excess income which was distributable to the grantor in the discretion of the husband-trustee was so distributable by a person not having an adverse interest and that it was, therefore, taxable to the grantor under Section 167. In so holding, the court indicated that in view of the family relationship and the sound financial circumstances of the husband and wife and their minor son, there was no adequate basis for concluding that the trustee had an interest substantially adverse to his wife merely because he could use accumulated income for the future support of the boy in case of necessity. (R. 9–12.) Cf. *Loeb* v. *Commissioner*, 113 F. (2d) 664 (C. C. A. 2d), certiorari denied, 311 U. S. 710; *Fulham* v. *Commissioner*, 110 F. (2d) 916 (C. C. A. 1st); *Altmaier* v. *Commissioner*, 116 F. (2d) 162 (C. C. A. 6th), certiorari denied, March 31, 1941, No. 774, October Term, 1940.

In support of her application for a writ of certiorari, the taxpayer urges that the trustee was le-

gally obligated to support his minor son (*In re Ganey*, 93 N. J. Eq. 389, 394, affirmed, 94 N. J. Eq. 502), as well as his mother and other blood relatives (New Jersey Revised Statutes, 1937, Title 44: 1–140) for the benefit of whom he had discretionary power to use trust income. But that obligation was neutralized by an equal, if not greater, obligation to support his wife, the grantor (*Sobel* v. *Sobel*, 99 N. J. Eq. 376, 378–379; *Bochm* v. *Bochm*, 88 N. J. Eq. 74, 78–79). Accordingly there is no basis for the conclusion that he would be interested in withholding the income from his wife in order to devote it to others. Furthermore, the wife was manifestly interested in the welfare of her son and the other relatives to whom distributions might be made. Viewing the situation realistically, as did the court below, there seems little basis for any conclusion that the husband would not have dealt with the income here involved in accordance with the wishes of his wife and it seems clear that "the scheme which the taxpayer now urges for the trust" (R. 12) is no more than a means whereby she might contribute to her son's estate and to relatives without liability for tax on the income thus indirectly devoted by her to such purposes. Cf. *Helvering* v. *Horst*, 311 U. S. 112; *Harrison* v. *Schaffner*, decided March 31, 1941, No. 437, October Term, 1940. In these circumstances the court below correctly concluded that the husband did not have a "substantial adverse interest" in the income

and that the grantor was therefore properly chargeable therewith under Section 167.

CONCLUSION

The decision below is correct. It turns upon the peculiar facts of the case and does not present a question of general importance. There is no conflict. The petition should be denied.

Respectfully submitted.

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JULY, 1941.